GAN KIM HENG* v. LEE SIEW SEOK

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) September 19, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 48 of 1969]

Will — Construction — Inconsistency in clauses of will — Revocation by implication — Intention of testator.

By clause 6 of his will a testator bequeathed a 1/10 share in certain specified properties (of which the testator held a 6/10 share) to his cousin *G*. In the subsequent clauses 7, 8, 9 and 10 the testator bequeathed various shares of the "said landed property" as follows: (a) to his four daughters 4/20 shares in the said property; (b) to his two sons (named) 6/20 share in the said property; (c) to his eldest son 4/20 share in the said property; and (d) to his widow 6/20 share in the said property. On an application for the proper construction of clause 6 of the will Raja Azlan Shah J. ([1969] 2 M.L.J. 67) held that under clause 6 the appellant was entitled to 1/10 of the whole land, however as the disposition in clause 6 of the will was inconsistent with the dispositions in the subsequent clauses the later clauses prevailed and the gift in clause 6 failed. On appeal,

Held, allowing the appeal: (1) the learned judge was right in the interpretation he made in open court as to clause 6 of the will;

(2) it would appear that the testator had only by implication revoked the prior gift to his cousin *G* for the simple reason that in making his devises to his widow and children on the proportions he directed, he had devised his whole landed property to them including the part he devised to his cousin *G*. Accordingly the devise to his cousin shall take effect and that the testator's widow and children shall take in the proportions stated in the will as to the residue of the landed property.

Cases referred to:—

(1) *Re Hammond, Hammond v. Treharne* [1938] 3 All E.R. 308.

(2) *Re Alexander's Will* Trust [1948] 2 All E.R. E.R. 111.

(3) *Kerr* v. *Baroness Clinton* (1869) L.R. 8 Equity 462.

(4) *Re Bywater, Bywater* v. *Clarke* (1881), 18 Ch. D. 17.

(5) *Shipperdson* v. *Tower* (1842), 62 E.R. 961.

(6) *Doe d. Amlot* v. *Davies* (1839), 150 E.R. 1560.

The following authorities were also cited in argument: *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99; *Haji Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45; *Re Gare decd.* [1952] Ch. 80, 83; *Re Tan Saw Gan decd.* [1968] 1 M.L.J. 17; 39 *Halsbury's Laws of England* 980, footnote (d) and para 1483; *Underhill & Strahan* on Wills & Settlements 3rd Edn. p. 44; *Odgers* on Pleadings & Practice 19th Edn. p. 348; 32 *Halsbury's Laws of England* 3rd Edn. p. 373; *Law Union and Crown Insurance Co.* v. *Hill* [1902] A.C. 263, 265; *Williams* on Wills 3rd Edn. p. 373; *Sarkar* on Evidence 11th Edn. p. 840 *Doe dem. Laicester* v. *Biggs* (1809) 2 Taunt 109; 127 E.R.; *Sherratt* v. *Bentley* (1834) 2 My. & K. 149; 39 E.R.; and *Scale* v. *Rawlins* [1892] A.C. 342.

FEDERAL COURT

Wong Soon Foh for the appellant.

Tan Keng Shoy for the respondent.

* alias Gan Kim Khay alias Gan Kim Kay.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Kuala Lumpur.

The appellant Gan Kim Khay as a beneficiary under a will of one Gan Ee Beng alias Gan Kim Cheng deceased applied to the judge in chambers for an order that on the true interpretation of clause 6 of the will of the deceased, he had devised in favour of the appellant one-tenth share of the landed property described as E.M.R. 1127, 1010 and 1126.

The said clause 6 reads as follows—

"I give devise and bequeath to my cousin Gan Kim Kay now aged 13 English years one-tenth (1/10th share) in the property known as E.M.R. Nos. 1127, 1010 and 1126 containing the respective areas of 5 acres 0 rood 24 poles, 3 acres 3 rood 10 poles wherein I possessed six out of ten (6/10th) shares if and when he attains the age of twenty-one years or if and when he marries whichever event shall first happen."

The learned judge made a declaration in chambers to the effect that on the true interpretation of the clause the appellant should get only one-tenth of the six-tenths owned by the deceased in the three E.M.Rs. and not as urged by the appellant that he should get one-tenth of the whole land held under the three E.M.Rs.

The learned judge subsequently adjourned the matter to open court and after further arguments by counsel for both parties changed his opinion and agreed with the interpretation of the said clause originally urged on behalf of the appellant. But at the same time however, he also came to the view that this devise in favour of the appellant must fail because in the subsequent clauses 7, 8, 9 and 10 of the said will the deceased had devised the whole of his landed property to his children and widow in the following manner:—

Clause 7 — To his four daughters each one-twentieth share of his "landed property".

Clause 8 — To each of his two sons named therein a three-twentieth share of his "landed property".

Clause 9 — To his eldest son Gan Boon Seng a four-twentieth share of his "landed property".

Clause 10 — To his widow six-twentieth share of his "landed property".

It is apparent that his various devises to his children and widow above, have exhausted his whole "landed property" which included the three E.M.Rs.

In his judgment the learned judge relied on the rule "That if in the same will there are two inconsistent and irreconciliable gifts and the court can find nothing else to assist in determining the question the later clause is to prevail as being the last expression of the testator's wish."

He cited *Re Hammond, Hammond v. Treharne*[1] where Simonds J. held that the bequest:—

"To Miss May Mission — one hundred pounds (£500)".

the later figures £500 would prevail.

The appellant in the present case appealed to this court against the second part of the judge's judgment and there is no cross-appeal against the first part of the judgment. In any case I wish to say that I think the learned judge was right in the interpretation he made in open court as to clause 6 of the will.

Now to the appeal.

Before us counsel cited *Re Alexander's Will Trust.*[2] In that case the testatrix by a clause in her will bequeathed "my five row diamond bracelet" to a beneficiary and by a subsequent clause bequeathed "my diamond chain bracelet" to another beneficiary. Roxburgh J. having allowed extrinsic evidence found that the testatrix had only one diamond bracelet, and held that as there was good ground for concluding that the testatrix had directed her mind to the earlier gift at the date of execution of the will, the rule that the later disposition prevails over an earlier had no application and the article being divisible, each beneficiary was entitled to a moiety.

I have, however, come across a case decided by Lord Romilly M.R. which, to my mind gives the answer to the problem in this case.

In *Kerr v. Baroness Clinton*[3] the Master of the Rolls held that the rule (that where there were two inconsistent clauses in a will the later clause revoked the prior clause) did not apply where the prior clause was expressed and the revocation in the later clause was only by necessary implication. In that case the testator gave the residue of his personal estate to his widow Baroness Clinton after payment of his just debts, funeral and testamentary expenses. In a subsequent clause in the same will he, however, directed that his trustees should sell his real estate or such part thereof to raise such sums or sum of money as his personal estate should prove insufficient for the payment of existing mortgages and charges upon his estate and subject thereto he devised the estate to his sons. It is apparent that the second clause standing by itself would be a clear direction that his personal estate should be applied to pay also the mortgages and charges on the real estate for which the testator was not personally liable. The second clause would therefore be inferred by implication to have revoked the prior direction that the residue of his personal estate would go to his widow. The Master of the Rolls, however, came to the view that this bequest by implication was not sufficient to revoke a bequest in express and distinct words and he thereupon declared to the effect that Baroness Clinton should take the residue of the personal estate.

Following the reasoning made in the *Kerr v. Baroness Clinton* case it would be apparent that the testator in the present case, had only by implication revoked the prior gift to his cousin for the simple reason that in making his devises to his widow and children in the proportions he directed, he had devised his whole landed property to them including the part he devised to his cousin. In the circumstances I would therefore direct that the devise to his cousin shall take effect and that the testator's widow and children shall take in the proportion stated in the will as to the residue of the landed property.

Suffian F.J.: With respect I agree that this appeal be allowed.

The learned judge was right in holding that under clause 6 the appellant is entitled to 1/10th of the three lands, but he was wrong in holding that this bequest failed because it conflicted with the bequests under the subsequent clauses.

The general rule that, if two parts of a will are totally inconsistent and cannot possibly be reconciled, the latter shall prevail is subject to qualifications. This was so stated by James L.J. in *Re Bywater, Bywater v. Clarke*[4] in reference to a case of two inconsistent gifts, a gift of something in one clause and a second gift of the same thing in another clause. He said at page 24:—

"... the rule is that the latter clause, *if a judge can find nothing else to assist him in determining the question*, is to prevail, as being the last expression of the testator's wish."

Before this case, there had been decided in 1842 in *Shipperdson v. Tower,*[5] where the learned Vice-Chancellor said at page 970:—

"The rule in favour of preferring the latter to the former of two dispositions in a will dealing differently with the same subject is, as we know, applied *only after the failure of every endeavour to give such reasonable construction to the entire dispositions as will render every part of them operative.*"

There are two examples in the law reports of the courts bending to give a reasonable construction to a will so as to render every part of it operative. First, there was a case decided in 1839, *Doe d. Amlot v. Davies.*[6] There a testator gave two houses to trustees in trust to pay the rents, etc., to his wife during widowhood, and afterwards "to the use of my children by my wife, equally to be divided between them, share and share alike, and the lawful issue of their bodies for ever." In a subsequent clause, he said, "I give, devise, and bequeath unto my daughter Frances James the

house where she now lives, after the decease of her mother, or the day of her marriage. Also, I give, devise, and bequeath unto my daughter Rachel James the house now in the occupation of David Davies, after the decease of her mother, or the day of her inter-marriage." The two houses mentioned in the second clause were the same as the two first spoken of. The testator never had more than the children named above. It was held that, upon the construction of the will, the daughters upon the death of the mother became tenants for life of each house, with immediate remainder to themselves as tenants in common in tail. Parke B. said at page 1564:—

"Now, adopting the rule .... that *we are to make all the parts of the will reconcilable if possible*, I think we may in this case make the whole consistent; *viz.*, by giving an estate for life in severalty to each of the daughters in one house, with remainder in both of them to the two, as tenants in common in tail. *Effect is thus given to every word in the will ....*"

The second example is *Re Alexander's Will Trust*(2) already mentioned by my Lord President.

Returning now to the instant will, I think that it is clear that the testator had intended to leave something (1/10th share of the lands) to the cousin, as otherwise clause 6 would not have been written at all. It is equally clear that the testator had also intended to leave only the *residue* of the same lands to his widow and children: he could not have intended to leave the whole of these lands to them, because he had already bequeathed part to his cousin. Such a construction of this will to render every part of it operative is a reasonable one, it makes all the parts of the will reconcilable and gives effect to every word in it.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Chooi & Co.; Cheah, Chew & Tan.*

SRI JAYA TRANSPORT CO. LTD. v. FERNANDEZ

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) September 19, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 69 of 1969]

Practice and Procedure — Appeal from order made by judge in chambers on application heard in open court — Application for leave to appeal — R.S.C. 1957, O. 54 rr. 22 & 22A — Courts of Judicature Act, 1964, s. 68(2).

In this case the respondent had applied by summons in chambers to amend his statement of claim. The application was heard in open court and granted. The appellants thereupon applied for a certificate under Order 54 r. 22A that the judge required no further argument. When the appellants got the certificate, they thought they were out of time and therefore application was made for special leave to appeal out of time under rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963.

Held: the appellants in this case should have applied for leave under section 68(2) of the Courts of Judicature Act, 1964 and as they had failed to do so and have not shown that there are special grounds for the court to exercise its discretion to grant them special leave to appeal out of time, the application must be dismissed.

Cases referred to:—

(1) *Abdul Majeed* v. *Yeo Chng Tay* [1964] M.L.J. 75.

(2) *Ramanath & Ors.* v. *Ban Tsan Chuan* [1967] 2 M.L.J. 284.

(3) *John Puddicombe Wilkins & Ors.* v. *John Patrick Kenelm Wilkins & Anor.* [1951] M.L.J. 80.

(4) *D.C. Butler-Madden v. Krishnasamy* [1947] M.U.L.R. 163; [1947] M.L.J. 182.

(5) *Re Coles and Ravenshear* [1907] 1 K.B. 1.

(6) *Hendry v. de Cruz* [1949] M.L.J. Supp. 25.

(7) *Manickam* v. *Tremelbye Rubber Co.* [1949] M.L.J. 90.

(8) *Re Macadam (No. 2)* [1950] 1 All E. R. 659.

(9) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91.

FEDERAL COURT

P. Mooney for the appellants/applicants.

Ranjit Singh for the respondent.

Cur. Adv. Vult.

Suffian F.J.: I have had the advantage of reading my brother Ali's judgment and I agree that this application (not for leave to appeal, but for leave to file notice of appeal out of time) be dismissed.

The order sought to be appealed from is an interlocutory order. As it happened, it was made not in chambers, but in open court under Order 54, rule 22, and it has been held by this court in *Nagappa Rengasamy Pillai v. Lim Lee Chong*(9) that, notwithstanding the proviso to Order 54, rule 22, in these circumstances the first limb of sub-section (2) of section 68 of the Courts of Judicature Act, 1964, does not apply, so that no appeal lies unless leave is obtained from this court or from a judge of the High Court. In other words, there is no need for the aggrieved party to apply, as has been done here, within four days of the making of the interlocutory order for a certificate from the judge that he requires no further argument.

If there is any conflict between section 68(2) of the Act and the Rules of the Supreme Court on this point, then it is clear from section 4 of the Act that the Rules, being written law in force at the commencement of the Act, shall give way to the section.